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In the Supreme Court of the United States

OCTOBER TERM, 1982

INTERSTATE COMMERCE COMMISSION, PETITIONER

v.

RITTER TRANSPORTATION, INC., RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

The issues presented are stated in a companion case, *Interstate Commerce Commission* v. *Steere Tank Lines, Inc., et al.* S. Ct. No. 82-41, filed July 9, 1982, which the Commission believes should be considered along with the instant Petition.

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OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 2a-6a) is reported at 684 F.2d 86. The opinion of Division 1 of the Commission (App. C, *infra* 10a) is unreported. The opinion of the Restriction Removal Board of the Commission (App. B, *infra*, 7a-9a.) is also unreported.

JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, 2a-6a) was entered on July 27, 1982. A petition for rehearing was not sought because the Commission believes that this case presents identical issues to those in *Interstate Commerce Commission* v. *Steere Tank Lines, et al.*, No. 82-41, in which a Petition For a Writ of Certiorari was filed on July 9, 1982. It is the Commission's view that since these cases raise identical issues, they should

be considered together. A petition for rehearing in this case could have delayed disposition by the Court on the Petition for A Writ of Certiorari in No. 82-41.

The Court's jurisdiction is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of 49 U.S.C. 10101 and 10922 are set forth at Appendix D, *infra*, 11a-20a. Pertinent provisions of 49 C.F.R. 1137 *et seq.*, are set forth at App. E, *infra*, 21a-33a.

STATEMENT

1. By the passage of the Motor Carrier Act of 1980, P. L. 96-296, 94 Stat. 793 (1980), (1980 Act) Congress formulated more liberal entry standards for all motor carriers of property than had existed under the Motor Carrier Act of 1935. To further the pro-competitive spirit of the 1980 Act, and as particularly pertinent to the instant proceeding, Congress enacted a new section to enable existing motor carriers to remove "unduly narrow restrictions" and "reasonable broaden" their overly-narrow existing authority. Pub. L. 96-296, §6, 94 Stat. 796-97, codified at 49 U.S.C. (Supp. IV) 10922(h).

In accordance with the Congressional mandate, the Commission promulgated restriction removal rules and guidelines designed to process expeditiously applications of motor carriers of property seeking to remove operating restrictions or broaden unduly narrow authorizations in their outstanding certificates.[1]

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[1]The Commission's implementation of the provisions of 49 U.S.C. (Supp. IV) 10922(h) may be found in the rules and guidelines promulgated in Ex Parte MC-142 (Sub-No. 1), *Removal of Restrictions From Authorities of Motor Carriers of Property*, 132 M.C.C. 374 (1980), codified at 49 C.F.R. 1137 *et seq.* Certain provisions of those guidelines, but not the procedural rules, were remanded for recon-

2. The United States Court of Appeals for the Fifth Circuit reviewed the application of the Commission's rules to restriction removal proceedings in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1982). In that case, the court found that the requirement governing new certificates that an applicant be "fit, willing, and able" to perform the authorized service (49 U.S.C. (Supp. IV) 10922(b)) was equally applicable to applicants under 49 U.S.C. (Supp. IV) 10922(h) seeking a removal of restrictions from existing authorities. The court thus remanded that proceeding in which the Commission has expanded authority to transport "spent silica gel, catalyst, in bulk" to "commodities in bulk."

3. In the instant proceeding, Port Norris applied pursuant to the Commission's restriction removal rules, to broaden its existing authority to transport cullet (broken glass) in bulk to commodities in bulk. It did not seek a broadening of its territorial authority. Port Norris provided the Commission with all the information required by 49 U.S.C. (Supp. IV) 10922(h)(2) and the Commission's rule implementing that Section, 49 C.F.R. 1137.10(c), and submitted a copy of its existing certificate. Specifically, Port Norris explained how its requested broadening of authority would allow it to offer a wide variety of services to shippers of bulk commodities, improve its efficiency, and increase competition, all of which are specific goals of the National Transportation Policy. 49 U.S.C. (Supp. IV) 10101(a). Notice of the application was published in the Federal Register. Com-

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sideration by the Commission in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981), as clarified on mandamus in *American Trucking Associations, Inc.* v. *ICC*, 669 F.2d 957 (5th Cir. 1982). A Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been filed seeking review of the *ATA* decision and mandamus. See *Interstate Commerce Commission* v. *American Trucking Associations, Inc.*, No. 82-86 (filed July 16, 1982).

ments were received from two motor carriers, Ritter Transportation and Schwerman Trucking Company.[2]

The Commission's Restriction Removal Board authorized the requested expansion to commodities in bulk. It found that the broadening sought by Port Norris would improve efficiency, allow Port Norris to offer cost saving to its customers and further the goals of the National Transportation Policy. It also concluded that, contrary to the commentors' suggestions, the requested expansion was permissible under the Commission's restriction removal rules. 49 C.F.R. 1137.21(b)(3).

Ritter Transportation petitioned for administrative review of the Board's decision,[3] arguing that the authority was "unreasonably broad" and suggesting that only a more limited expansion to "clay, concrete, glass, or stone products" was permissible under the statute. 49 U.S.C. (Supp. IV) 10922(h).

A division of the Commission rejected the appeal stating that Ritter had failed to demonstrate the presence of "extraordinary circumstances" necessitating the Commission's review. 49 C.F.R. 1137.14(a).

4. On judicial review, the United States Court of Appeals for the District of Columbia Circuit vacated the decision and remanded the proceeding to the agency. (App A, *infra*, 2a-6a).

The court followed the *Steere* decision closely and found that the "fit, willing, and able" standard (49 U.S.C. (Supp. IV) 10922(b)) is an element of the restriction removal provision, 49 U.S.C. (Supp. IV) 10922(h).

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[2]49 U.S.C. (Supp. IV) 10922(h)(2) provides that interested parties should have the opportunity "to comment" on restriction removal proceedings.

[3]A decision of the Restriction Removal Board is a final action, the review of which is discretionary with the Commission. 49 C.F.R. 1137.14(c).

Although acknowledging that the applicant detailed how expansion of its authority would conserve energy resources, improve efficiency, and increase both competition and revenues, the court found the application and the Commission's consideration of it deficient for its failure to address the issue of whether the applicant is "fit, willing, and able to provide the transportation authorized by the certificate." (App. A, *infra*, 4a-5a). The court stated (App. A, *infra*, 5a):

> We agree with the Fifth Circuit that the Motor Carrier Act of 1980 did not repeal sub silentio §10922(a)(1)(A)'s requirement that an applicant be found "fit, willing, and able to provide the transportation for which it is seeking authorization." *Steere I, supra*. The term "reasonably broaden," as used in §10922(h)(1)(B)(i), includes a consideration of whether an applicant is "fit, willing, and able."

The court also agreed with the holding in *Steere* that, because of the expeditious nature of restriction removal proceedings, an applicant's showing of fitness, willingness, and ability to perform the expanded service "need not be elaborate." (App. A, *infra*, 6a).

Because the Commission's decision in this proceeding was served before the October, 1981 decision in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981) which partially invalidated the restriction removal rules and before the decision in *Steere* which first articulated the proposition that the "fit, willing, and able" criteria is pertinent in restriction removal proceedings, Ritter did not raise before the Commission the issue of applicant's fitness. The court did not address this issue but instead relied heavily upon the decision in *Steere* to support its view that Port Norris failed to establish a *prima facie* case that it was fit, willing, and able to

transport all commodities which could be transported in bulk under its expanded certificate.

REASONS FOR GRANTING THE PETITION

The reasons for granting the petition are thoroughly set forth in the *Petition for a Writ of Certiorari in Interstate Commerce Commision* v. *Steere Tank Lines, Inc., et al.*, S. Ct. No. 82-41 filed July 9, 1982, which involves a similar fact pattern and identical issue as the instant case. As explained in the Petition in that companion case, by engrafting the fit, willing, and able test onto the restriction removal provision of the Act, 49 U.S.C. (Supp. IV) 10922(h), the court has fettered the Commission's discretion in implementing the deregulatory policies of the 1980 Act. The court has, in effect, substituted its judgment for that of the Commission as to what constitutes a reasonable broadening of an existing certificate by holding that an expansion from one commodity in bulk to commodities in bulk cannot be a reasonable expansion under the statute unless the applicant demonstrates and the Commission finds that the applicant has shown itself to be fit, willing, and able to transport all possible groups of commodities that would be authorized under the expanded authority.

The decisions in both *Steere* and the instant proceeding impose an even heavier burden on an applicant seeking only an expansion of existing authority than one seeking to enter an entirely different field of service under a new certificate of operating authority by requiring that the former carrier not only demonstrate that its service will promote the goals specifically enunciated in 49 U.S.C. (Supp. IV) 10922(h) as the basis for obtaining authority, but also that it demonstrate that it is fit, willing, and able to transport all possible groups of commodities that

would be authorized under its expanded authority[4]. The magnitude of the non-statutorily required additional burden which the court below would impose on an applicant for a commodity broadening is starkly presented by this proceeding. The lower court explicitly held that applicant had detailed how expansion of its authority as requested would conserve energy resources, improve efficiency and increase both competition and revenues (App. A, *infra*, 5a). Thus, the court, in effect, held that applicant had satisfied the statutorily prescribed criteria for obtaining an expansion of existing authority, but nonetheless remanded the matter to the Commission. Even if viewed solely as a matter of statutory interpretation, the court below, as the court in *Steere*, has improperly infringed upon the agency's right to have upheld its interpretation of a statute which it helped draft (See *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961); *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 549 (1940)) and is charged with implementing "unless there are compelling indications that it is wrong." *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 598 (1981), quoting from *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969).

Because the United States Court of Appeals for the District of Columbia Circuit, as the court in *Steere*, has

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[4]Although the court in *American Trucking Associations, Inc.* v. *ICC*, 659 F.2d 452 (5th Cir. 1981) expressed the view that the "fit, willing, and able" test may be applicable to restriction removal proceedings, it was not until the decision in *Steere Tank Lines, Inc.* v. *ICC*, 666 F.2d 255 (5th Cir. 1981) that the court clarified its position and explicitly held the fitness test to be part of an applicant's prima facie case in a restriction removal proceeding. Thus there can be no doubt that the propriety of the courts in engrafting the fit, willing, and able test upon the certificate broadening provisions of the act is appropriately before this Court in our petition for writ of certiorari in No. 82-41.

emasculated the restriction removal provision, 49 U.S.C. (Supp. IV) 10922(h), by imposing on applicants a requirement that was not intended by Congress, we respectfully request that the Court consolidate this Petition with that in *Steere* and consider the arguments presented in the *Steere* petition in conjunction with the instant proceeding.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted.

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